Supreme Court, U.S.
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No. 97-1785

In The

Supreme Court of the United States

October Term, 1997

SHMUEL KLEIN,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state attorney disciplinary charge may be based upon a bench ruling of the Federal Bankruptcy Court imposing sanctions on the attorney without a prior hearing when, on remand from the United States District Court of Appeals for the Second Circuit, the Bankruptcy Court reimposed the sanctions after a hearing, and when the attorney, in the interim, did not exhaust his procedural remedies in the state courts?

2. Whether an attorney disciplinary charge may be based upon a court order which, after a hearing, imposed sanctions based upon its findings that the attorney repeatedly failed to heed the court's warnings to cease his abusive conduct, and repeatedly ignored the court's order that no further motions be made without prior court approval?

3. Whether the Appellate Division of the Supreme Court of the State of New York, which is empowered to oversee the practice of law in the state, after a full and fair hearing at which the attorney was represented by counsel, may suspend an attorney for a five-year period based upon the unique set of facts and circumstances in the case?

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Appendix A — Memorandum Decision And Order Imposing Sanctions Against Shmuel Klein Of The United States Bankruptcy Court Of The Southern District Of New York Dated May 11, 1998 ..... 1a

PRELIMINARY STATEMENT

This brief is submitted in opposition to Petitioner's application for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated June 30, 1997, which suspended him from the practice of law for five years effective July 30, 1997. Petitioner's motion for reargument of the court's June 30, 1997 decision or, in the alternative, for leave to appeal to the State of New York Court of Appeals, was denied by decision and order of the Appellate Division dated July 30, 1997. On its own motion, however, the Appellate Division adjourned the effective date of the suspension to August 13, 1997. Petitioner's motion for leave to appeal to the State of New York Court of Appeals was denied by said court, by order dated September 23, 1997, on the ground that no substantial constitutional question was directly involved. Petitioner's motion for renewal and/or reargument of the September 23, 1997 State of New York Court of Appeals' order was denied by order dated December 22, 1997.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under this Court's Rule 10. The statutory provision is Title 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

By order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated and entered January 3, 1996, Respondent herein was authorized to institute and prosecute a disciplinary proceeding against Petitioner herein. The issues raised by the disciplinary petition and any answer thereto were referred to the Special Referee, the

Honorable Lawrence Martin, a former justice of the Supreme Court of the State of New York, Westchester County, to hear and report.

A petition containing three charges of professional misconduct, dated March 18, 1996, was served upon Petitioner, alleging that he had been guilty of conduct involving dishonesty, fraud, deceit or misrepresentation; conduct adversely reflecting on his fitness to practice law; and conduct prejudicial to the administration of justice.

Petitioner filed a motion to dismiss, dated March 29, 1996, which was denied by order of the Appellate Division, dated June 6, 1996.

A pretrial conference was held on July 30, 1996, and a disciplinary hearing was held on August 26, 1996, at which Petitioner was represented by counsel and had a full and fair opportunity to be heard. Petitioner and Respondent each submitted both post-trial and reply briefs, after which Justice Martin issued a Report of Referee, dated January 14, 1997, wherein he found that each of the three charges against Petitioner had been sustained.

In sustaining Charge One of the disciplinary petition, the Special Referee found that the United States Bankruptcy Court for the Southern District of New York, Westchester Division, justifiably sanctioned Petitioner for (1) acting in an over zealous manner and in contravention of Bankruptcy Court rules and procedures; (2) making misrepresentations to the Bankruptcy Court about the imminence of a foreclosure sale; (3) lying at a Bankruptcy Court hearing; and, when the bankruptcy proceeding was dismissed because of his failure to appear; (4) bringing on another bankruptcy proceeding falsely alleging that

there were no other bankruptcy filings in the prior six years. Petitioner claimed that the false representation regarding a prior bankruptcy filing was a mistake, but the Special Referee did not find Petitioner's claim to be any more credible than did the bankruptcy judge.

In sustaining Charge Two of the disciplinary petition, the Special Referee found that the Supreme Court of the State of New York, Rockland County, justifiably sanctioned Petitioner for raising ten affirmative defenses in a legal malpractice action that had been filed against him, which defenses were dismissed by the court as either not constituting a defense to the claim alleged, or were wholly without merit. Petitioner failed to make any showing of merit to the defenses on the motion to dismiss, and the court warned Petitioner to stop the harassment and histrionics.

A different judge took over the malpractice action, and also warned Petitioner about his continuing conduct, then set the matter down for a hearing on sanctions. After the hearing, the judge found that, although the plaintiff had not agreed to have the malpractice action arbitrated by a religious court, Petitioner made three motions for arbitration. He admittedly had no legal basis for doing so. Then, when the plaintiff later agreed to religious arbitration, Petitioner contemptuously told the court he no longer wanted the arbitration, stating that he wanted the plaintiff to remain in the court action. After the hearing on sanctions, Petitioner submitted a further affirmation in support of his omnibus motion, which asserted the arbitration demand yet another time. Based on Petitioner's admissions at the disciplinary hearing, the Special Referee found that Petitioner still did not seem to appreciate the impropriety of his actions.

In sustaining Charge Three of the disciplinary petition, the Special Referee found that Petitioner made a false statement to

Respondent in an answer to a complaint of professional misconduct. Although Petitioner gave extensive testimony at the disciplinary hearing in an attempt to imbue the statement at issue with a meaning other than the obvious one, the Special Referee found Petitioner's testimony to be unworthy of belief.

By order dated June 30, 1997, the Supreme Court of the State of New York, Appellate Division, Second Department, granted Respondent's motion to confirm in full the report of the Special Referee, and suspended Petitioner from the practice of law in the State of New York for a period of five years, and until further order of the court. Petitioner's motion for reargument of the court's June 30, 1997 decision or, in the alternative, for leave to appeal to the State of New York Court of Appeals, was denied by decision and order of the Appellate Division dated July 30, 1997. On its own motion, however, the Appellate Division adjourned the effective date of the suspension to August 13, 1997. Petitioner's motion for leave to appeal to the State of New York Court of Appeals was denied by said court, by order dated September 23, 1997, on the ground that no substantial constitutional question was directly involved. Petitioner's motion for renewal and/or reargument of the September 23, 1997 State of New York Court of Appeals' order was denied by order dated December 22, 1997.

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS NO STANDING WITH RESPECT TO THE FIRST OF HIS "QUESTIONS PRESENTED FOR REVIEW" AND DID NOT EXHAUST HIS PROCEDURAL REMEDIES IN THE COURTS BELOW.

Subsequent to the State of New York Court of Appeals' denial of Petitioner's motion for leave to appeal, the United States Court of Appeals for the Second Circuit, by decision entered October 20, 1997, found that Petitioner was constitutionally entitled to a hearing before sanctions were imposed against him by the Bankruptcy Court. Said decision vacated the Bankruptcy Court's June 9, 1994 bench ruling, on which Charge One of the disciplinary petition was based, and remanded it to the Bankruptcy Court for a hearing on the issue of sanctions.

By memorandum decision dated May 11, 1998 the Bankruptcy Court, after giving Petitioner an opportunity to be heard, reaffirmed the findings set forth in its June 9, 1994 bench ruling, and reimposed sanctions against him. (App. A, pp. 1a-24a). The May 11, 1998 decision moots Petitioner's argument that he was suspended from the practice of law partially based upon a disciplinary charge which itself was based upon a court order violative of due process.

It is respectfully submitted that Petitioner had a full and fair opportunity to be heard on whether the Bankruptcy Court's sanctions were rightfully imposed, putting to rest any question of whether a state disciplinary charge may be based on an order found to violate due process. Therefore, the first question presented by Petitioner is moot.

The mootness of the question notwithstanding, Petitioner did not exhaust his procedural remedies before petitioning this Court for a writ of certiorari: He failed to seek relief from the Supreme Court of the State of New York, Appellate Division, Second Department, when the United States District Court of Appeals for the Second Circuit vacated and remanded the ruling upon which Charge One of the disciplinary petition is based. The issue is procedural, not constitutional.

Furthermore, Petitioner's suspension from the practice of law is only partially based on the sanctions imposed by the Bankruptcy Court, which served as the basis for Charge One of the disciplinary petition. The suspension is also based on the Appellate Division's findings that Petitioner engaged in the egregious misconduct alleged in Charges Two and Three of the disciplinary petition, which, even without the misconduct alleged in Charge One, support a suspension from the practice of law.

II.

THE COURT ORDER UPON WHICH CHARGE TWO OF THE DISCIPLINARY PETITION IS BASED DID NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE UNITED STATES CONSTITUTION.

Petitioner claims that the court order upon which Charge Two of the disciplinary petition is based violated the free exercise clause of the United States Constitution. He has repeatedly raised the same argument in the proceedings below, and it has repeatedly been found to be without merit. In fact, Petitioner attempted throughout the course of the disciplinary proceeding to manufacture constitutional questions where none exists. Merely cloaking a question in the mantle of constitutional language, however, does not elevate it to a legitimate

constitutional question meriting review by this Court. In actuality, Petitioner simply disagrees with the factual findings and legal determinations of the State of New York Supreme Court, Appellate Division, Second Department, which suspended him from the practice of law; the State of New York Court of Appeals, which reviewed the suspension decision; and the two separate courts in the matters underlying Charges One and Two of the disciplinary petition.

Petitioner's statement at page thirteen of his petition for writ of certiorari (referring to the legal malpractice action underlying Charge Two of the disciplinary petition) that he "was also suspended based upon an order which sanctioned him for insisting on his First Amendment Right to practice his religion by bringing a motion to arbitrate before a Rabbinical Court" is a distortion and misrepresentation of the facts. As Justice Rudolph's decision, dated March 29, 1995, sets forth in detail Petitioner's repeated attempts to have the malpractice action removed to a Rabbinical Court, despite the plaintiff's refusal to agree and the court's dismissal of prior applications, are only a portion of the extensive misconduct for which he was sanctioned.

Upon information and belief, the malpractice action was filed against Petitioner in the State of New York Supreme Court, Rockland County, in July 1993. Justice Rudolph's March 1995 decision reflects that during the interim period Petitioner repeatedly was warned of the court's extreme displeasure with his various misconduct, and advised of the consequences if he continued to conduct himself in an improper manner and ignore the court's directives.

In an attempt to justify his repeated motions to have the malpractice matter referred to the Rabbinical Court for arbitration, in spite of the court's prior dismissals of same,

Petitioner testified at the disciplinary hearing that he was motivated by good intentions: He wanted the matter referred to the Rabbinical Court so that the plaintiff, Dr. Goldstock, would be in compliance with Jewish law and would not be ostracized by the Orthodox Jewish community. Even assuming *arguendo* that Petitioner was motivated by an altruistic impulse to "save" the man who was suing him for malpractice, that does not excuse his conduct. Surely it should have been left to Dr. Goldstock to decide whether he wanted to litigate in the civil or the Rabbinical Court. Dr. Goldstock should not have been subjected to Petitioner's oppressive litigation tactics, even assuming they were misguided attempts to coerce Dr. Goldstock into complying with a religious law that Petitioner had arrogantly decided was good for him.

Furthermore, the record of the disciplinary proceeding reflects that Petitioner did not request that his rabbi send a summons to Dr. Goldstock until December 1994. If Petitioner was motivated by a concern that Dr. Goldstock would be ostracized by the religious community if he did not agree to have the matter heard by a Rabbinical Court, why did Petitioner wait a year-and-a-half to manifest his concern by seeking the rabbi's intervention? Similarly, if Petitioner was motived by concern for his own standing in the religious community, why did he wait such a length of time after the malpractice action was filed before seeking the rabbi's intervention?

In any event, the speciousness of Petitioner's argument that his suspension was partially based upon an order sanctioning him for insisting on his First Amendment right to practice his religion by bringing a motion to arbitrate before a Rabbinical Court is illustrated by the fact that when Dr. Goldstock finally succumbed to Petitioner's pressure and agreed, in or about May 1995, to have the matter removed to a Rabbinical Court, Petitioner told Justice Rudolph "in a

contemptuous manner such as to offend the Court," that he had changed his mind and wanted Dr. Goldstock to remain a party in the pending malpractice action.

III.

PETITIONER'S FIVE-YEAR SUSPENSION FROM THE PRACTICE OF LAW DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The five-year suspension imposed upon Petitioner by the State of New York Supreme Court, Appellate Division, Second Department, is not excessive or a violation of equal protection, as Petitioner claims. It is solely within the discretion of the Appellate Divisions of the New York State courts to determine appropriate sanctions after reviewing each disciplinary matter individually and carefully weighing each unique set of facts and circumstances, being mindful that one of the clear purposes of such disciplinary sanctions is to preserve public confidence in the legal profession. *See Matter of Nulle*, 97 A.D.2d 657.

In the proceedings below, Petitioner argued that the New York courts had been inconsistent in imposing disciplinary sanctions in cases of similar misconduct. In support of his argument, Petitioner cited two cases wherein the court censured attorneys (*In re Higgins*, 105 A.D.2d 462; *Matter of Werlin*, 170 A.D.2d 77), one case wherein the court imposed a three-month sanction (*Matter of Brenner*, 191 A.D.2d 800) and one case wherein it imposed a one-year sanction (*Matter of Sanchirico* (209 A.D.2d 341) for misconduct that Petitioner apparently views as analogous in severity to his own. All the cases have widely varying fact patterns, both from each other and from the facts at issue in Petitioner's disciplinary proceeding. Rather than having the intended effect of

demonstrating the unfairness of Petitioner's five-year suspension, a reading of the cited cases clearly demonstrates that the Appellate Divisions, in the interests of fairness and justice, review each matter individually and carefully weigh each unique set of facts and circumstances before reaching a conclusion as to an appropriate sanction.

In any event, Petitioner's argument conveniently ignores the plethora of cases in which the Appellate Divisions imposed sanctions of equal severity for misconduct similar to Petitioner's (*see, e.g., Matter of Gabel*, 201 A.D.2d 3, wherein the court suspended Mr. Gabel for five years for making a misstatement to the State of New York Supreme Court and a false statement to the Grievance Committee in his answer to a complaint of professional misconduct).

It is respectfully submitted that the Appellate Division appropriately exercised its discretion in imposing a five-year suspension in Petitioner's case, based upon the facts and circumstances of the case, and that Petitioner has failed to present any equal protection issues that warrant review by this Court.

IV.

JURISDICTION ON WRIT OF CERTIORARI IS NOT WARRANTED IN THIS MATTER.

Rule 10 of the United States Supreme Court Rules is entitled "Considerations Governing Review on Certiorari." It states:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling

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nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Although Rule 10 is not exhaustive, the facts of the instant matter do not relate to the "character of the reasons" that this Court will consider for a petition for a writ of certiorari. The issues involved in this case do not reach the constitutional dimensions worthy of address by the Supreme Court of the

United States. Petitioner couched his arguments in constitutional due process, free exercise, and equal protection language, but, in fact, he simply disputes the factual findings and legal determinations made by the courts below. Because none of the arguments advanced by Petitioner involves an important question of federal law that has not been, but should be, addressed by this Court, its further consideration of Petitioner's claims is not warranted.

CONCLUSION

Petitioner has presented no constitutional issue or important federal question that warrants review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM DECISION AND ORDER IMPOSING SANCTIONS AGAINST SHMUEL KLEIN OF THE UNITED STATES BANKRUPTCY COURT OF THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 11, 1998

UNITED STATES BANKRUPTCY COURT OF THE SOUTHERN DISTRICT OF NEW YORK

In re

Moses Stein

Debtor.

Chapter 13
Case No. 94 B 20708 (SMB)

MEMORANDUM DECISION AND ORDER IMPOSING SANCTIONS AGAINST SHMUEL KLEIN

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Appendix A

STUART M. BERNSTEIN
United States Bankruptcy Judge

By Order dated June 9, 1994, I dismissed this chapter 13 case with prejudice, and *sua sponte* imposed monetary sanctions on the debtor's attorney, Shmuel Klein ("Klein"), without prior notice. Klein appealed the award of sanctions to the United States District Court which affirmed. Thereafter, Klein appealed to the United States Court of Appeals for the Second Circuit. In *In re Moses Stein*, 127 F.3d 292 (2d Cir. 1997), the Court concluded that Klein was entitled to prior notice of the sanctions motion, and vacated and remanded the matter so that he could present a response. The Second Circuit noted, however, that a full evidentiary hearing was not required. *Id.* at 295.

Following the remand, I issued an order to show cause directing the parties to appear for the purpose of scheduling further proceedings. I conducted a conference on December 15, 1997, which Klein and counsel for Ulster Savings Bank ("USB"), the debtor's mortgagee, attended.[1] I afforded Klein sixty days to submit a response to the sanctions motion. Klein thereafter submitted his own affirmation, those of two former employees, and that of Joseph J. Haspel, Esq., his counsel in disciplinary proceedings pending in the state courts, in opposition to the imposition of sanctions.

For the reasons that follow, I conclude that Klein signed the chapter 13 petition in this case in violation of Federal Bankruptcy Rule 9011. As a result, I sanction him in the sum of $500.00.

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1. USB's counsel attended the conference in response to the order to show cause, but has not submitted papers in connection with the pending matter. Counsel explained that Klein paid the $1,000.00 in sanctions that I had ordered him to pay to USB, and that USB did not wish to spend further time or money participating in the matter.

Appendix A

BACKGROUND

This background discussion is based upon the record of the prior proceedings in this case,[2] Klein's submissions in the matter *sub judice*, and Bankruptcy Judge Adlai S. Hardin, Jr.'s opinion in *Ulster Savings Bank v. Kizelnik (In re Kizelnik)*, 190 B.R. 171 (Bankr. S.D.N.Y. 1995), a subsequent chapter 13 case filed by Klein, on behalf of the debtor's granddaughter, following the dismissal of this case.

A. Events Leading Up to the Order Imposing Sanctions

On December 22, 1987, the debtor, Moses Stein, and his nondebtor spouse, Rivka Stein, executed a note and mortgage in favor of USB on their home located at 28 Dorsett Road, Spring Valley, New York. *In re Kizelnik*, 190 B.R. at 173. They defaulted in May 1992, and USB obtained a judgment of foreclosure in April 1993. *Id.* USB scheduled the first foreclosure sale for May 1993, but the Steins, represented by Klein, obtained a stay of the sale from the state court pending a traverse hearing on September 13, 1993. *Id.* The Steins failed to appear at the traverse hearing, the court lifted the stay, and USB scheduled a second foreclosure sale for November 15, 1993. *Id.* Moses Stein, again represented by Klein, filed a chapter 13 petition in this Court one day before the foreclosure sale. This prevented the foreclosure from going forward because the filing of the petition triggered the automatic stay. *Id.*

On March 10, 1994, USB presented its motion to lift the automatic stay. Opposing the motion, Klein represented both orally and in writing that the debtor had made postpetition

2. Annexed as an appendix is the *Extract of Bench Ruling Dismissing Chapter 13 Case and Imposing Sanctions on the Debtor's Attorney*, filed June 14, 1994 ("Extract").

mortgage payments. He offered as evidence three *uncancelled* third party checks, dated December 1, 1993, January 1, 1994 and February 1, 1994, but separated by only seven check numbers. I signed an order the same day granting USB relief from the stay, and USB scheduled a third foreclosure sale.

On or about March 28, 1994, Klein presented an *ex parte* order to show cause, requesting that I schedule a hearing on the debtor's motion to vacate the March 10 order. The order to show cause contained a decretal paragraph that immediately reimposed the stay pending the hearing. Klein did not tell USB's attorney that he was seeking the equivalent of a temporary restraining order, did not explain why he had not, and his papers did not set forth the nature of the emergency that required immediate, *ex parte* relief. *See* Fed. R. Civ. P. 65(b). Accordingly, I declined to sign the proposed order to show cause.

On or about March 30, 1994, Klein presented a second order to show cause, this time on notice to and in the presence of USB's attorney. Klein's papers again failed to set forth any emergency, but he represented at the chambers conference that the foreclosure sale was imminent. USB's attorney — who had travelled from Kingston, New York to Bowling Green to attend the conference — responded that no sale was imminent (it was scheduled for April 28, 1994, four weeks hence). He observed that Klein could have learned this with a telephone call. In response, Klein blamed USB's counsel for not calling him to advise him that no foreclosure sale was imminent.

At the chambers conference, Klein also stated that it was necessary to resolve the stay issue prior to the confirmation

hearing scheduled for April 7, 1994, before Judge Gallet.[3] Accordingly, I scheduled the vacatur motion for April 6, 1994. I did not grant an immediate stay because no sale was imminent.

The proof at the April 6 hearing showed that Klein had sent three checks to USB's attorney mixed in with a pile of other documents and sealed in an envelope *self-addressed to Klein*. USB's attorney did not open the sealed envelope. Instead, he held the envelope up to the light, determined that it contained checks, and mailed them back to Klein. Klein again blamed USB and/or its attorney. He stated that the envelope was not sealed, and was included to facilitate the return of a receipt. Upon questioning from the bench, however, Klein conceded that he lacked any personal knowledge about the transmission of the checks and admitted that he did not ask either USB or its lawyer to return a receipt. I concluded that Klein had lied to cover his office's mistake in sending the checks to USB's attorneys with the opposition papers rather than to USB as the debtor was required to do.

Nevertheless, it appeared that the debtor sincerely wanted to pay the mortgage, save the home from foreclosure, and presumably, pay the two years of arrears under the chapter 13 plan. Accordingly, at the conclusion of the hearing, I vacated the March 10 Order, and issued an Order reimposing the automatic stay, on condition that the debtor pay the five outstanding postpetition mortgage payments by April 14. I also imposed a $500.00 sanction on Klein.

Having fought so hard to reimpose the stay and make the payments, the debtor should have been eager to comply. Instead,

3. Following Judge Schwartzberg's death, Judge Gallet and I sat in White Plains one day each week. This lasted for approximately four months from February through June, 1994.

he again defaulted. Further, unbeknownst to me — Klein had never mentioned it — the chapter 13 trustee had moved to dismiss his case because the debtor failed to attend the meeting of creditors required by 11 U.S.C. § 341(a),[4] or to make the plan payments, pending confirmation, as required by 11 U.S.C. § 1326.[5] The trustee's motion was also returnable on April 7, 1994, the same day as the confirmation hearing and only one day after the vacatur hearing that Klein insisted had to go forward. Neither the debtor nor his counsel appeared on April 7, and Judge Gallet dismissed the case.

On April 26, 1994, only two days before the third scheduled foreclosure sale, the debtor commenced this chapter 13 case, again represented by Klein.[6] The petition that Klein signed

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4. Section 341(a) states:

> Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors.

5. Section 1326(a)(1) states:

> Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.

The debtor must file his chapter 13 plan within 15 days of the petition date. Fed. R. Bankr. P. 3015(b). It appears that Stein filed his plan with his petition.

6. One may legitimately ask why he did not make the mortgage payments and reimpose the automatic stay under the April 6 order. He had fought hard for the right to make the payments. In addition, the automatic

(Cont'd)

certified that the debtor was eligible to file a second petition.[7] USE moved to lift the stay or to dismiss this second case. On June 9, 1994, I concluded that the case was not filed in good faith, and dismissed the second case with prejudice pursuant to 11 U.S.C. 109(g)(1). I stated at the time:

> [T]he petition was not filed in good faith, but instead was filed to frustrate the legitimate rights of Ulster which the Court had granted under the conditional order. The Debtor has managed to occupy his residence for an extended period without paying his mortgage. His response to the initial foreclosure sale was to file a Chapter 13 petition as the hammer was about to fall. The Debtor never appeared at the Section 341 meeting, or made the payments required by 11 U.S.C. §1326 (a)(1). After the Court granted a conditional order for relief from the stay, requiring the Debtor to make the post-petition payments, the Debtor failed to satisfy the conditions. In addition, the Debtor failed to appear at the confirmation hearing, failed to oppose the motion to dismiss, permitted the prior case to be dismissed, and then filed a new case, again on the eve of

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(Cont'd)
stay would have been reinstated, preventing a foreclosure by USB. The answer presumably lies in the relative economics of chapter 13. Here, the automatic stay was purchased more cheaply by filing a new petition rather than by paying the mortgage arrears.

7. Klein also falsely certified that Stein had not filed a bankruptcy in the previous six years. He now attributes this to an oversight by his clerical staff. In their haste to put together the second petition, they inadvertently used the same page from the first bankruptcy petition. (*See Affirmation of Andrea Klein*, dated Feb. 10, 1998.) Even if I credit this explanation, it does not affect the outcome.

> foreclosure, reimposing the automatic stay without the necessity of making the payments required under the conditional order.

(*Extract* at 7.) In addition to dismissing the case, I directed Klein to pay sanctions in the sum of $1,000.00 to USB and $2,500.00 to the bankruptcy clerk. He paid the former but not the latter.

B. Subsequent Filings

Following the dismissal with prejudice of the debtor's second case, USB rescheduled the foreclosure sale, for the fourth time, for July 19, 1994. *In re Kizelnik*, 190 B.R. at 173. Klein moved by order to show cause to stay the sale, citing his intention to file an appeal from this Court's order dismissing the second petition. Bankruptcy Judge Connelly denied that motion for failure to timely file a notice of appeal. *Id.*

The debtor faced a quandary. He could not stay the sale because he could not file another case until 180 days had lapsed following Judge Gallet's dismissal. *See* 11 U.S.C. § 109(g)(1). On July 18, 1994, however, one day before the foreclosure sale, Klein filed a chapter 13 petition on behalf of Bracha Kizelnik, Stein's granddaughter. *In re Kizeluik,* 190 B.R. at 174. Kizelnik contended that she was a tenant in her grandparents' house and held an option to purchase it. When it became apparent that Kizelnik had no interest in the property or personal liability to USB, the bank commenced an adversary proceeding seeking a declaratory judgment or relief from the stay. *Id.* Judge Hardin concluded that Kizelnik had no right to de-accelerate the mortgage and cure the Steins' mortgage defaults in her own chapter 13 plan. Finding that the sole reason for

Kizeluik's filing was to block the foreclosure sale of the Steins' property, Judge Hardin dismissed Kizelnik's case, and provided that any future filings by any person claiming an interest in the Steins' property would not operate as a stay on USB's right to foreclose absent a further order of the Court. *Id.* at 184. Judge Hardin concluded:

> The controversy between USB and the Steins and their granddaughter Kizelnik has been the subject of numerous proceedings in the state courts, three separate bankruptcy cases in this Court and innumerable decisions and orders in all of the courts affirming and reaffirming USB's right to proceed with and consummate its foreclosure on its collateral.
>
> . . . The time has come to bring this interminable skein of litigation to an end.

Id.

DISCUSSION

As a threshold matter, Klein argues that another judge should decide the sanctions motion. First, Klein contends that following remand, the case should have been reassigned to Judge Hardin who sits in White Plains Bankruptcy Court. Second, he states that I am personally biased against him. Neither point requires my removal from the case.

A. Improper Assignment

Initially, the propriety of the assignment to me following remand is also presently on appeal to the District Court. Klein

filed a notice of appeal from the order to show cause that I issued scheduling the conference that eventually took place on December 15, 1997. His *Designation of Record and Statement of Issues Pursuant to Bankruptcy Rule 8006*, dated Nov. 25, 1997, states that under the local rules of this court, the remanded case should have been referred to the bankruptcy judge sitting in Westchester.

It is not my intention to intrude on the District Court's jurisdiction. Nevertheless, Klein has raised the same issue before me, and has never sought a stay pending appeal. In any event, the issue is a frivolous one, and should not delay the fulfillment of the Second Circuit's mandate. Rule 8016-1 of the local bankruptcy rules governs assignment upon remand. It states in pertinent part:

> If the order or judgment of the appellate court remands for further proceedings, a motion for such further proceedings shall be referred to the Judge who heard the proceeding below unless the appellate court orders otherwise.

Accordingly, to the extent that the issue is properly before me, I conclude that the assignment is proper.

B. Disqualification for Bias

Klein also argues that I should recuse myself because I am biased against him. (*See Affirmation of Shmuel Klein in Support of Motion to Disqualify and for Prover Assignment*, dated Nov. 25, 1997.) Disqualification for bias is governed by 28 U.S.C. § 455 which is made applicable by Fed. R. Bankr. P. 5004(a). Section 455 states, in pertinent part:

Appendix A

> (a) Any justice, judge, or magistrate [judge] of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

The type of personal bias that supports a recusal motion ordinarily must be based on extrajudicial conduct, *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1141 (2d Cir. 1994), and "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *See United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992); *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990), *cert. denied*, 501 U.S. 1238 (1991). Moreover, the opinions that a judge forms in the course of the proceedings do not constitute the basis for a bias or partiality motion unless they display a deep-seated antagonism that makes fair judgment impossible. *Liteky v. United States*, 510 U.S. at 555; *United States v. Conte*, 99 F.3d 60, 65 (2d Cir. 1996).

Klein has not pointed to any extrajudicial evidence of bias.[8] Moreover, he overlooks that his conduct in the debtor's bankruptcy

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8. Klein seems to argue that I should recuse myself because I recused myself in a later matter also involving him, *In re Albert Aflalo*, Case No. 94 B 45050. There, Klein represented a chapter 13 debtor and signed and filed numerous proofs of claim on behalf of certain creditors, each in the sum of

(Cont'd)

cases may not have left the best impression. Klein lied to cover his office's failure in sending the mortgage payment checks to USB's attorney in a self-addressed and sealed envelope rather than directly to USB. He tried to obtain an *ex parte* temporary restraining order, and then dragged USB's counsel down from Kingston, New York, to oppose his request for an immediate injunction which was unnecessary. He did not tell me that his client had failed to attend the section 341 meeting or make the deposits required of all chapter 13 debtors, and that as a result, the chapter 13 trustee was asking Judge Gallet to dismiss the case on April 7, 1994. Instead, he urged me to schedule the vacatur hearing for April 6, telling me only that the confirmation hearing was scheduled for the next day. Further, when he ultimately prevailed at the April 6 hearing and obtained a conditional order, he failed to appear the next day before Judge Gallet who dismissed the debtor's case, and instead of making the past due mortgage payments, filed yet another case on the eve of foreclosure to stay the sale.

Here, Klein has sought to recuse me to avoid defending the sanctions motion. As discussed below, he barely contests

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$1.00 (in one case, $10.00). These "claims" deviated substantially from the information in the debtor's schedules which Klein had presumably prepared and submitted on that debtor's behalf. The chapter 13 trustee expressed bewilderment and concern, and Klein's associate, who attended the May 25, 1995 hearing, could not explain why Klein had signed and filed patently false claims.

The filing of these claims was deeply troubling, and Klein withdrew them that same day by letter to the trustee, dated May 25, 1995 At the hearing, I questioned Klein's good faith and directed the chapter 13 trustee to make an appropriate motion. I subsequently recused myself from deciding the trustee's sanctions motion that I had invited. Although it was beyond cavil that the Klein claims lacked any factual basis and delayed the confirmation process, it may have *appeared* that I had prejudged the matter.

his objective bad faith in this case, or the mandatory sanction that flows from Federal Bankruptcy Rule 9011. Instead, he blames the sanction on me, and insists that I step aside because I have criticized his actions in this case. If my imposition of sanctions under these circumstances required recusal, any judge who held a party or lawyer in contempt or imposed sanctions would have to recuse himself or herself in all subsequent proceedings. Accordingly, the recusal motion is denied.

B. The Motion for Sanctions

1. Bankruptcy Rule 9011

Fed. R. Bankr. P. 9011[9] requires a court to sanction an attorney or party who signs a pleading or other submission that

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9. The version of Federal Bankruptcy Rule 9011 that was in effect at the time in question stated in pertinent part:

> Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. . . . The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorneys or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. . . . If a document is signed in violation of this rule, the court on motion or on its

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he knows, or should know after reasonable inquiry, contains misstatements. It is similar to the pre-1993 version of Fed. R. Civ. P. 11, and a court may look to the developed case law under the former Rule 11 in interpreting Bankruptcy Rule 9011. *See In re Coones Ranch, Inc.*, 7 F.3d 740, 742 n.4 (8th Cir. 1993); *In re Cohoes Indus. Terminal, Inc.*, 931 F.2d 222, 227 (2d Cir. 1991); *In re 72nd Street Realty Assocs.*, 185 B.R. 460, 470 (Bankr. S.D.N.Y. 1995). In *Cohoes,* the Second Circuit Court of Appeals established the criteria for applying Bankruptcy Rule 9011:

> A petition for Chapter 11 bankruptcy may be deemed frivolous if it is clear that on the filing date there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge from bankruptcy proceedings. [Citations omitted]. Generally, courts should conclude that a debtor has no demonstrable intent to reorganize only if, upon considering the totality of the circumstances, there is substantial evidence to indicate that the debtor made a bad faith filing. [Citations omitted].

Id. at 227.

The test for bad faith under Rule 11 — and hence, Bankruptcy Rule 9011 — is an objective one. *Sussman v. Bank*

(Cont'd)

> own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

of Israel, 56 F.3d 450, 456-57 (2d Cir.), *cert. denied*, 516 U.S. 916 (1995); *Oliveri v. Thompson*, 803 F.2d 1265, 1275 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). An attorney cannot escape sanctions by demonstrating his subjective good faith. *Sussman v. Bank of Israel*, 56 F.3d at 456; *Oliveri v. Thompson*, 803 F.2d at 1275; *Eastway Construction Corp. v. City of New York*, 762 F.2d at 253. To support sanctions under Rule 11, it must be "patently clear that a claim has absolutely no chance of success." *Eastway Construction Corp. v. City of New York*, 762 F.2d at 254.

Before filing a petition, an attorney must investigate whether his client is eligible to be a debtor and whether the filing is in good faith and not abusive. *In re Bono*, 70 B.R. 339, 344-45 (Bankr. E.D.N.Y. 1987). The attorney's signature on the petition constitutes a certification, under Bankruptcy Rule 9011, that the client is eligible to file and entitled to the benefits of Title 11, and that the client's purpose in filing is not simply delay. *Id.* at 344.

As discussed below, Klein violated Rule 9011 by signing the April 26, 1994 chapter 13 petition on his client's behalf. Klein's certification that his client was eligible to be a chapter 13 debtor was improper in light of the bar on refiling imposed under 11 U.S.C. § 109(g)(1). Rather, it was designed to frustrate USB in exercising its legitimate right to foreclose a mortgage that had not been paid in two years.

2. Section 109(g)

Section 109(g) of the Bankruptcy Code is designed to prevent abusive serial filings. *In re Rosenthal*, 117 B.R. 710,

711 (Bankr. M.D. Fla. 1990); *In re Ellis*, 48 B.R. 178, 179 (Bankr. E.D.N.Y. 1985) (former § 109(f)); *see Generally* 2 Lawrence P. King, *et al.*, *Collier on Bankruptcy* ¶ 109.08, at 109-45 (rev. 15th ed. 1998). It provides that

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if —
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

11 U.S.C. § 109(g).

Subdivision (1) is disjunctive; it applies if the court dismisses the earlier bankruptcy for either of the enumerated willful failures. *See, e.g., In re Arena*, 81 B.R. 851, 855 (Bankr. E.D. Pa. 1988)("willful" modifies both prongs of section 109(g)(1)). In determining the individual's eligibility in the subsequent case, the court must consider the totality of the circumstances surrounding the prior dismissal. *See In re Miller*, 143 B.R. 815, 819 (Bankr. W.D. Pa. 1992); *In re Fulton*, 52 B.R. 627, 634 (Bankr. D. Utah 1985); *In re Patel*, 48 B.R. 418, 419 (Bankr. M.D. Ala. 1985).

Appendix A

Judge Gallet dismissed Stein's first case, on the motion of the chapter 13 trustee, for (1) failure to attend a section 341 meeting and (2) failure to make payments to creditors as required by 11 U.S.C. § 1326(a). Both are "failure[s] of the debtor to abide by orders of the court." *See. e.g.,* In re Montgomery, 37 F.3d 413, 414 (8th Cir. 1994) (section 341 meeting); *In re Nix*, 217 B.R. 237, 238 (Bankr. W.D. Tenn. 1998)(section 1326(a) payments); *In re Pappalardo*, 109 B.R. 622, 625 (Bankr. S.D.N.Y. 1990) (section 341 meeting); *In re Dodge*, 86 B.R. 535, 537 (Bankr. S.D. Ohio 1988) (both); *cf. In re King*, 126 B.R. 777, 781 (Bankr. N.D. Ill. 1991) (chapter 13 debtor's failure to make payments is a failure to appear before the court in proper prosecution of the case). Moreover, Stein "fail[ed] to appear before the court in proper prosecution of his case" when he failed to appear at the hearing on the motion to dismiss. *See In re Arena*, 81 B.R. at 855. Accordingly, if one or more of these failures was willful, section 109(g)(1) barred Stein's subsequent filing within the statutory period.

A failure is "willful" if it is intentional, deliberate, or knowing and voluntary, and not conduct which is accidental or beyond the person's control. *See, e.g., In re Bradley,* 152 B.R. 74, 76 (E.D. La. 1993); *In re McIver*, 78 B.R. 439, 441 (D.S.C. 1987); *In re Miller*, 143 B.R. at 818-19; *In re Pappalardo*, 109 B.R. at 625; *In re Ellis*, 48 B.R. at 179. In addition to deliberate or intentional conduct, the term also encompasses plain indifference to a known responsibility. *See, e.g., In re Nix*, 217 B.R. at 23839; *In re Miller*, 143 B.R. at 819; *In re Howard*, 134 B.R. 225, 226 (Bankr. E.D. Ky. 1991); *In re Ellis*, 48 B.R. at 179. While the mere failure to appear at one meeting or court hearing, or to make a payment under the proposed chapter 13 plan, is not by itself willful *e.g., In re Dodge,* 86 B.R. at 537, repeated instances of such conduct support the inference

that the failures were willful. *See. e.g., In re Nix*, 217 B.R. at 239; *In re Herrera,* 194 B.R. 178, 189 (Bankr. N.D. Ill. 1996); *In re Pappalardo*, 109 B.R. at 626; *In re King,* 126 B.R. at 780; *In re Fulton*, 52 B.R. at 634; *In re Nelkovski*, 46 B.R. 542, 544 (Bankr. N.D. Ill. 1985). The Court is obliged to weigh the debtor's explanations against the totality of the circumstances, including repeated failures, in determining whether the conduct was willful. *In re Fulton*, 52 B.R. at 634.

The totality of these circumstances signals but one conclusion to the objective inquirer: the dismissal in the first case was based on willful failures. Klein filed Stein's first case in November 1993 to stay USB's foreclosure sale. Thereafter, Stein failed to do anything required of a chapter 13 debtor. He did not attend the section 341 meeting, he did not make the required plan payments,[10] he did not make his postpetition mortgage payments and he did not appear at the confirmation hearing or oppose the dismissal motion on April 7. In short, he did what was necessary to stay the foreclosure but took no further steps to perform his duties as a debtor or to pay his obligations. When I directed him to pay USB as the price for reinstating the automatic stay, he simply permitted the case to be dismissed, filed a new case, and obtained a new stay.

Klein's conduct subsequent to the dismissal sheds additional light on the willfulness of the first dismissal and the bad faith

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10. Stein missed up to four plan payments. He had to make his first plan payment within thirty days after he filed his plan, *see* 11 U.S.C. § 1326(a), and it appears that he filed his plan with his petition on November 15, 1993. Stein's plan is not in evidence but chapter 13 plans generally call for monthly payments. Assuming he followed the general practice, and prior to the April 7, 1994 dismissal, he would have had to make plan payments on or about December 15, 1993, January 15, 1994, February 15, 1994 and March 15, 1994.

in filing the second case. In this regard, a court may consider subsequent conduct in passing on the issue of bad faith under Fed. R. Civ. P. 11, and hence, Bankruptcy Rule 9011. *See Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1471-72 (2d Cir. 1988) (subsequent conduct evidence of indifference to truth of prior pleading signed by attorney), *rev'd in part on other grounds, Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989); Ouadrozzi v. City of New York, 127 F.R.D. 63, 80 n. 30 (S.D.N.Y. 1989) (subsequent conduct may support an inference that an earlier signing was done in bad faith); *cf. In re National Student Marketing Litig.*, 78 F.R.D. 726, 729 n. 5 (D.D.C. 1978) (subsequent conduct sheds light on improper motive in filing counterclaim), *aff'd*, 663 F.2d 178 (D.C. Cir. 1980); *Grand Traverse Dev. Co. Ltd. Partnership v. Board of Trustees of the Gen. Retirement Svs. (In re Grand Traverse Dev. Co. Ltd. Partnership)*, 150 B.R. 176, 192 (Bankr. W.D. Mich. 1993)("additional facts or subsequent conduct may shed new light on the debtor's good faith in pursuing bankruptcy"). When Stein could no longer seek bankruptcy to delay the foreclosure, Klein filed a contrived case for Stein's granddaughter, *In re Kizelnik*, 190 B.R. 171, which Bankruptcy Judge Hardin concluded lacked merit and dismissed with prejudice.

Even without these subsequent facts before him, District Judge Brieant found the second filing objectively unreasonable. In affirming the first award of sanctions, District Judge Brieant put the point succinctly:

> The record is clear that the appellant filed the second bankruptcy petition with the knowledge that such a petition violated Title 11, Section 109(g)(1), and he endorsed the filing of the pleading falsely stating that the debtor Stein had not filed a prior

> petition in the previous six years. So there is no rule of law that warrants the filing of a petition.
>
> There is no good faith argument as to why the statute should be changed or why it should not apply to the debtor's second filing. . . .[T]he Court does believe that there was no objective good faith basis for filing the second petition in the way that it was done and with the content that it contained, and the Court finds that the Bankruptcy Judge did not exceed his authority or abuse his discretion in imposing the sanctions. . . .

(*Affirmation of Shmuel Klein*, dated Feb. 13, 1998, Ex. "B" (*Affidavit of Joseph J. Haspel, Esq.*, at ¶ 18).)

Even at this late date, Klein has still not said why he thought Stein could file another case only three weeks after Judge Gallet dismissed the prior case. Moreover, he has failed to provide any evidence to contradict the application of section 109(g)(1), or the conclusion that he signed the second petition in bad faith.[11] All that he offers in his defense is an oblique reference to the state of the law in the affidavit of Joseph Haspel, Esq.[12], which

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11. He apparently argued to the Second Circuit that Stein failed to attend the section 341 meeting because Stein was ill, and that he (Klein) missed the dismissal hearing before Judge Gallet because he was caught in traffic. *In re Stein*, 127 F.3d at 293. Klein has not repeated either excuse in opposition to the present motion. In any event, neither excuse is credible. The docket sheet in the first Stein bankruptcy (case no. 93 B 22242) indicates that Klein never filed any opposition to the motion to dismiss. This implies that he did not intend to oppose it.

12. Klein characterizes Mr. Haspel as "an expert in the field of Bankruptcy." (*Affirmation of Shmuel Klein*, dated Feb. 13, 1998, at ¶ 3.) Suffice it to say that we are equally adept at interpreting the bankruptcy law.

Klein submitted to the New York Court of Appeals in connection with his suspension from practice.[13] (*Affirmation of Shmuel Klein*, dated Feb. 13, 1998, Ex. "B".) Mr. Haspel based his analysis on the mistaken premise that Judge Gallet dismissed the first Stein case solely because Stein missed a section 341 meeting. (*Id.* at ¶ 23.) Mr. Haspel evidently did not know that Stein also failed to make any plan payments, and that he failed to oppose the motion to dismiss or appear in court on April 7.

In any event, the three cases that Mr. Haspel cites do not support his proposition that reasonable minds would question the willfulness of the prior dismissal. (*See id.*, Ex "B." ¶ 22.) *In re Wamsganz*, 54 B.R. 759 (Bankr. E.D. Mo. 1985), *aff'd*, 804 F.2d 503 (8th Cir. 1986), does not even discuss the issue. *In re Arena*, 81 B.R. 851 (Bankr. E.D. Pa. 1988) refused to find willfulness where the debtor failed to appear at the section 341 meeting because he forgot about it and failed to appear at the hearing on the motion to dismiss because his wife misdirected the notice. Finally, *In re Dodge*, 86 B.R. 535 (Bankr. S.D. Ohio 1988) concluded that the failure to attend the section 341 meeting and make the deposits — both present here — constituted a failure to abide by an order of the court under section 109(g)(1), *id.* at 537, but the court refused to infer the requisite willfulness based upon the facts of that case. *Id.*

As noted, the evidence of willfulness is far more compelling in this case. More important, Klein does not argue that he researched this issue, and believed that Stein could file a new case on the heels of the prior dismissal. In fact, Klein has never

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13. The Appellate Division, Second Department suspended Klein from practice for five years, effective July 30, 1997, based in part on what transpired in this bankruptcy case. *See Matter of Klein*, 660 N.Y.S.2d 136 (N.Y. App. Div. 2d Dep't), *appeal dismissed & lv. to appeal denied*, 686 N.E.2d 1357 (N.Y. 1997).

contested Judge Brieant's conclusion that he lacked the objective basis to believe he had any right to file the second case. Klein knew or should have known — had he investigated the matter during the three week interval separating the first dismissal from the second filing — that section 109(g)(1) prevented the second petition.

3. The Amount of the Sanction

In light of the conclusion that the Klein violated Rule 9011, sanctions are mandated. When this case was first before me, I directed Klein to pay $1,000.00 to USB and $2,500.00 to the bankruptcy clerk. (*Extract* at 9-10.) Klein paid the bank but challenged the larger award. The Second Circuit did not reach that aspect of his appeal. *In re Stein*, 127 F.3d at 295.

I now conclude that the award should be reduced to $500.00. First, his conduct in this case has contributed to his suspension from practice, although I note that this has not stopped him from continuing to practice law in New York.[14]

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14. Klein's suspension took effect on or about August 1, 1997. Since then, he has filed the following twenty-nine bankruptcy cases in the Southern District of New York: *In re Pedro*, Case No. 97 B 22081 (filed 8/8/97); *In re Morton*, Case No. 97 B 22085 (filed 8/11/97) *In re Houston*, Case No. 97 B 23151 (filed 12/9/97); *In re Cintron*, Case No. 97 B 23186 (filed 12/15/97); *In re Weinstein*, Case No. 97 B 23197 (filed 12/16/97); *In re Benjaminson*, Case No. 97 B 23245 (filed 12/19/97); *In re Tzavis*, Case No. 97 B 23244 (filed 12/19/97); *In re Weissmandl*, Case No. 97 B 23243 (filed 12/19/97); *In re Glatzer*, Case No. 98 B 20068 (filed 1/13/98); *In re Solis*, Case No. 98 B 20069 (filed 1/13/98); *In re Yee*, Case No. 98 B 40215 (filed 1/13/98); *In re Lella*, Case No. 98 B 20109 (filed 1/14/98); *In re Menard*, Case No. 98 B 20110 (filed 1/14/98); *In re Fernandez*, Case No. 98 B 20111 (filed 1/14/98); *In re Nixon*, Case No. 98 B 20112 (filed 1/16/98); *In re Ottley*, Case (Cont'd)

Nevertheless, Klein supports a family, including eight children, and a large monetary sanction will exacerbate whatever hardship the suspension may impose on his family. Second, the amount is consistent with the sanctions imposed by other courts against Klein for similar conduct. *See, e.g., Michelson v. Chicago Bd. of Trade*, No. 83 Civ. 8898 (MEL), 1990 WL 74865, at *1 (S.D.N.Y. May 30, 1990)($500.00 sanction based on "meaningless opposition" to summary judgment motion); *Michelson v. Merrill Lynch Pierce Penner & Smith Inc.*, No. 83 Civ. 8898 (MEL), 1989 WL 31514, at *6-7 (S.D.N.Y. Mar. 28, 1989)(imposing two $500.00 fines based upon a groundless claim of witness tampering); *cf. First Nationwide Bank Inc. v. Felberman*, 657 N.Y.S.2d 431, 432 (N.Y. App. Div. 2d Dep't 1997) (directing Klein to pay $2,500.00 to the Lawyer's Fund for Client Protection of the State of New York for prosecuting a frivolous appeal).

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No. 98 B 20305 (filed 2/5/98); *In re Hirsch*, Case No. 98 B 20440 (filed 2/20/98); *In re Elkoby*, Case No. 98 B 20479 (filed 2/25/98); *In re Licerio*, Case No. 98 B 20556 (filed 3/4/98); *In re Kapsack*, Case No. 98 B 20557 (filed 3/4/98); *In re Turco*, Case No. 98 B 20671 (filed 3/13/98); *In re Bernardo*, Case No. 98 B 21079 (filed 4/21/98); *In re Kahan*, Case No. 98 B 21080 (filed 4/21/98); *In re Ohle*, Case No. 98 B 21081 (filed 4/21/98); *In re Smith*, Case No. 98 B 21145 (filed 4/29/98); *In re Dikitnan*, Case No. 98 B 21146 (filed 4/29/98); *In re Pomeroy*, Case No. 98 B 21147 (filed 4/29/98); *In re Ismail*, Case No. 98 B 21148 (filed 4/29/98); and *In re Kiss*, Case No. 98 B 21228 (filed 5/6/98).

Appendix A

SO ORDERED.

Dated: New York, New York

May 11, 1998

s/ Stuart M. Bernstein
STUART M. BERNSTEIN
United States Bankruptcy Judge